83-2

FILED
JUL 1 1983
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM J. LEVENTHAL,

PETITIONER,

V.

MURRAY P. REISER ET AL,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

William J. Leventhal,
Pro Se

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QUESTION PRESENTED FOR REVIEW

Whether it was error for the Court of Appeals for the First Circuit to decide this case in a way that conflicts with this Court's holdings in Imbler v. Pachtman, 424 U.S. 409, 47 L.Ed2d 128, 96 S.Ct. 984 (1976) by extending and enlarging the shield of prosecutorial immunity beyond that which was specifically (and intentionally) excluded by this Court; and to thereby prematurely decide genuine issues of material fact ?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO. _____

WILLIAM J. LEVENTHAL,

PETITIONER,

V.

MURRAY P. REISER ET AL, [1]

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner William J. Leventhal, respectfully prays that a writ of certiorari issue to review the judgment

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[1] Robert Snider is also a Respondent.

of the United States Court of Appeals for the First Circuit entered on March 1, 1983.

OPINION BELOW

The Court of Appeals entered its Memorandum Decision affirming the District Court's summary dismissal of the action on March 1, 1983. A copy of the Memorandum is attached as Appendix "A."

The Lower Court also denied petitioner's petition for rehearing and suggestion of rehearing en banc on April 7, 1983. A copy of the order is attached as Appendix "B."

JURISDICTION

On March 1, 1983, the Court of Appeals entered judgment affirming the District Court's dismissal of the action of the grounds of prosecutorial immunity. Imbler v. Pachtman, 424 U.S. 409, 47 L.Ed 2d 128, 96 S.Ct. 984 (1976).

The Court of Appeals appears to have decided a federal question in a way that conflicts with the applicable decision(s) of this Court. Imbler, supra.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

Amend. V:

> "No person shall ... be deprived of life, liberty, or property, without due process of law ..."

Amend. VI:

> "... the accused shall enjoy the right to a ... trial, by an impartial jury ..."

Amend. XIV:

> " ... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The First Circuit Court of Appeals, affirming the District Court's dismissal of the action brought under 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. §§ 1983 and 1985(2) and (3), held that:[2/]

> " ... prosecutors enjoy absolute immunity as to 'activities ... intimately associated with the judicial phase of the criminal process.'" (Appendix "A").

In its denial of a petition for rehearing en banc the lower court further held:

> "Whether the prosecutor's conduct was improper or not is irrelevant. When, as here, the activity concerns the prosecutor's conduct in the trial of the case ..." (Appendix "B").

[2/] The action is not an attempt to circumvent habeas corpus relief, nor a collateral attack on the original conviction. Petitioner, not in custody, was freed in 1968, has no other forum or remedy wherein to obtain vindication of his federally protected rights. See: Guerro v. Mulhern, 498 F.2d 1249 (1st Cir. 1974); cf. Masstracchio v. Ricci, 498 F.2d 1257, 1260 fn 2 (1st Cir. 1974).

The conduct complained of, however, was (1) that the respondents, not only as individuals and members of the bar but also incidently as state court prosecutors, failed to notify the court during a criminal prosecution of the petitioner (in 1965) that one of the state's chief witnesses gave a juror sitting in the case a ride home during the trial; and (2) that they actively participated in concealing and suppressing discovery of their knowledge and activities for 14 years, until petitioner obtained testimony of their involvement from the witness himself in 1979, under a court order.(Appendix to Appeals Court Brief, pp. 3-48). [3/]

[3/] Foreclosed by the District Court's dismissal of the action on the same day it allowed late filing of documentary material and denied evidentiary hearing (Appendix to Appeals Court Brief, pp. 1-2, Docket Entries), Petitioner intended to submit testimony from others who were privy to knowledge of the witness-juror contact; evidence of a financial benefit to those who participated in concealment of the (continued)

The Respondents, after being told about incident, took it upon themselves unilaterally to accept the witness' version of the event, to suppress it, did not inform the court or the petitioner, and took no action to initiate an investigation of the truth, or to obtain the juror's story. (Appendix to Appeals Court Brief, pp. 127-165 ,Petitioner's Affidavit in Opposition to Motion To Dismiss).

Other witnesses testified as to their knowledge of what the witness told the Respondents privately and about the unilateral agreement to accept that version only as the true one: "That there was no discussion about the case." (Appendix to Appeals Court Brief, pp. 13-48, Exhibits). An alternate juror, however, testifying

(Continued) witness-juror contact and a benefit from the conviction of the petitioner; and evidence of the witness' malice toward the petitioner.

some 14 years later, stated that the jurors were in an uproar about it, that the juror should not have taken the ride, and that the jurors agreed between themselves to keep quiet about it. [4/] On the 3rd day of the trial, the trial judge admonished the jury in strong terms about their exposure to outside influences. (Appendix to Appeals Court Brief, pp. 130-137, Exh. "1").

During the intervening years, in 1969, in an attempt to successfully quash his deposition, the Respondent Reiser in a State Court action filed an affidavit stating that his "...knowledge is set forth in the official transcripts of the trial or are state secrets." (Emphasis Added). (Appendix to Appeals Court Brief, pp. 138-162, Exh. "3," Deposition, 1980).

[4/] The original juror's list had disappeared from the court records. The alternate juror's name appeared in the transcripts, thus making him available.

He also claimed to have made inquiries 6 or 7 years later about the incident but without making any disclosure to the court or the petitioner that there was something to inquire about, or that he knew about it.

REASONS FOR GRANTING THE WRIT [5/]

A. When Prosecutorial Misconduct, Not Connected With The Initiation Or Presentation Of The Case, Occurs, It Is Unprotected By The Shield Of Absolute Immunity.

These Respondents did not exercise the kind of independent prosecutorial (read "judicial") judgement that was envisioned by this Court in Imbler v. Pachtman, 424 U.S. 409, 430, fn. 25, 47 L.Ed2d 128, 96 S.Ct. 984 (1976). Imbler never suggested that constitutional gua-

5/ Petitioner is not an attorney.

rantees (i.e., 5th, 6th and 14th Amendment rights) should take a back seat to prosecutorial immunity when the prosecutor acts in a capacity other than as an advocate initiating and presenting his case. The Imbler Court stated in no uncertain terms (Id. fn. 33) that it did not consider whether immunity should apply (Id. at pp. 430-431),

> " ... for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of an advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from civil suit for damages under § 1983." (Emphasis Added).

The whole theory of liability in this case is not, as the Lower Court determined, " ...dependent on the defendants acting in their roles as prosecutors during the judicial phase of the criminal process." (Appendix "A"). Their role as

prosecutors was only incidental to the (more than) casual encounter between their witness and the juror with their failure to report it to the judge. Their role was completely outside the criminal and judicial process, was outside the trial itself; and was not a function characteristic and common to all criminal proceedings. They usurped a judicial function; they were not acting as prosecutors when they covered it up; suppressed and concealed their knowledge of the encounter, while in office and after leaving office. Their overt acts to hide what they knew, to hide what they had done, constituted an obstruction of justice, as attorneys and as individuals, not just as prosecutors, violating at their peril the constitution and clearly established constitutional rules. Butz v. Economou, 438 U.S. 478, 507, 57 L.Ed2d 895, 98 S.Ct. 2894 (1978). They were mere by standers and intruders conveniently

situated for their witness to absolve himself of any responsibility from not having informed the court directly.

By not informing the Court themselves, these Respondents prevented the trial judge from exercising his authority to inquire into the matter, prevented the Court from holding a voir dire (in which the defense could participate) and from taking corrective measures, if necessary. Smith v. Phillips, 102 S.Ct. 940, 948, 71 L.Ed2d 78 (1982). The petitioner, who had personal and constitutional rights at risk, was unilaterally excluded and deprived of not only knowing about the incident in a timely fashion, but also to have the Court at a meaningful place assess at that time the impact of an extraneous influence upon the jury. See: U.S. v. Perrotta, 553 F.2d 247, 249 (1st Cir. 1977)(setting the rules for the court's inquiry). The Respondents took upon themselves to exercise

a constitutionally intolerable discretion. Mattox v. U.S., 146 U.S. 140, 150 (1892); Remmer v. U.S., 347 U.S. 227 (1954), 350 U.S. 377 (1956).

Before summarily granting the Respondents the shield of immunity in this case, what they did, what they did not do, what they should have done, and whether they had the authority for whatever they did or did not do, must be examine as genuine issues of material fact. Barrett v. U.S., 689 F.2d 324 (2nd Cir. 1982). If it can be conceivable that the Respondents acted within the prosecutorial shield of judicial immunity, then obviously it was also incumbent upon them to have followed the same rigid investigatory requirements that a judge would be required or held to do. U.S. v. Pierce, 593 F.2d 415 (1st Cir. 1979); U.S. v. Corbin, 590 F.2d 398, 400 (1st Cir. 1979); Hanscomb v. Meachum, 535 F.Supp. 1162 (D. Mass. 1977); 2 Wright

Fed. Prac. & Proc. § 554, at p. 491-92 (1969). The decision of the panel of the First Circuit in this case is inconsistent and in direct conflict with its own decision in Siano v. Justices of Massachusetts et al, 598 F.2d 52 (1983 1st Cir.) which gave support to and was entirely within the confines of the limitations imposed by Imbler, supra.

B. A Prosecutor's Absolute Immunity Is Narrowly Circumscribed.

In the case of Siano v. Justices of Massachusetts et al, supra, the First Circuit stated:

> "A prosecutor's absolute immunity is narrowly circumscribed, encompassing only actions necessary 'in initiating a prosecution and in presenting the state's case.' (Imbler) Id. at 431." (Emphasis Added).

In that context then, on its face, the decision (Appendix "A" and "B") of the 1st Circuit in the instant case before this

Court is patently in error. It lends itself to unreliable conclusions inconsistent with the facts in evidence, and does not meet a reasonable standard of a well reasoned opinion of a court of appeals. The decision overreaches Imbler and gives the shield of immunity a broader meaning and perspective than this Court intended.

The suppression and concealment of a witness' encounter with a juror is not a necessary part of initiating a prosecution and the presentation of a case. Such actions do not serve "to protect the functioning of the criminal justice system and to further its goal of determining guilt or innocence accurately." Siano, supra. It is not within the honest prosecutor's proper duties associated with the judicial phase of the criminal process to deliberately and intentionally avoid notifying the court of an encounter with a juror by

a witness or anyone else. Failing to report the encounter is not a proper function of an honest prosecutor's duties. [6/] Reporting the encounter would not deflect the honest prosecutor's energies from his public duties. Reporting the encounter would not cause an honest prosecutor to bend his energies from the faithful performance of his public duties. Reporting the encounter would not cause an honest prosecutor to shade his decisions instead of exercising his independent judgment required by his public trust. Indeed, an honest prosecutor would exercise his

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6/ The Respondent Snider, testifying 15 years later in 1980, recalling his thoughts at that time in 1965, said: "My God, after all that lengthy trial and all these people coming in, something like this happens and causes a problem, and everyone would be horrified by the whole thing with literally thousands of dollars and thousands of people coming in, and it would be thrown in jeopardy by this incident." (Appendix to Appeals Court Brief, pp. 39-48, Exh. "C").

independent judgment required by his public trust and oaths of office to report the encounter to the court. Reporting the encounter would not prevent the honest prosecutor from the vigorous and fearless performance of his office. The failure to report the encounter is not essential to the proper functioning of the criminal justice system!

C. The Sanctity of the Jury is Supreme.

Any action by a prosecutor, judicial officer, or any other person which may interfere with the integrity of the jury system comes squarely within the absolute prohibitions of Mattox v. U.S., 146 U.S. 140, 150 (1892). Contacts between jurors and third persons, "or witnesses, or the officer in charge, are absolutely forbidden." The sanctity of the jury is stronger and preempts the Imbler shield of immunity.

The sanctity of the jury is constitutional, not judge made like the shield of immunity. Although a prosecutor may have absolute immunity in presenting his case, which may be done dishonestly, notwithstanding that concept, there is a higher overriding duty and responsibility to preserve and protect the integrity of the jury.

The Respondents had no legal authority or other justification so to do for the witholding from the courts, state and federal, information that strikes to the very foundation of our system of jurisprudence: THE SANCTITY OF THE JURY. While under an affirmative duty and obligation to tell the court(s) about the unauthorized intrusion upon the jury, the Respondents made a free choice, deliberately and intentionally, and opted to prevent the court(s) or anvone else (outside of the inner circle) from learning about what

had happened and that they knew about it. See: Imbler, supra, fn. 25 at 427, fn. 33 at 431. At the very least an honest prosecutor would have reported it after the trial was over. Smith v. Phillips, supra. Securing a conviction was paramount to the way it was secured, for these Respondents and those who were privy to knowledge of the encounter. The remedial powers 15 and more years after the event for the trial court, appellate review, and state and federal post-conviction remedies to re-enact what had occurred, subject only to the witness' self-serving version of the event, to determine "whether an accused has received a fair trial" (Imbler, supra at 427) would be an exercise in futility.

D. The Duty To Report An Encounter With A Member Of The Jury Rests Equally Upon Everyone Regardless Of Their Status.

It is as absurd now as it was then to ever suppose that anyone could ever have the authority and the duty not to report an encounter, known to him, with a member of the jury, and then to expect that he could rely upon his supposed official status to shelter himself and have such conduct sanctioned with the mantle of immunity to be able to conceal and suppress that such an encounter had occurred. If a judge could not do such in activity "... intimately associated with the judicial phase of the criminal process" (Appendix "A"), a prosecutor surely should not. The Respondents' duty and obligation, however, to report the incident was not limited because of their incidental role as prosecutors. The unauthorized contact was neither initiated by them in the performance of their official duties and office, nor was it essential to or a part of the prosecution of the state's case, nor were they

acting as advocates when the concious decision was made not to report the incident. At most they were only attorneys, officers of the court, when they were told of the unauthorized encounter with the juror. See: Guerro v. Mulhern, 498 F.2d 1249 (1st Cir. 1974); U.S. v. Rhodes, 556 F.2d 599, 601 (1st Cir. 1977); U.S. v. Doe, 513 F. 2d 709, 712 (1st Cir. 1975); U.S. v. Perrotta, 553 F.2d 247, 249 (1st Cir. 1977); U.S. v. Pierce, 593 F.2d 415 (1st Cir. 1979).

In view of the trial judge's prior strong admonition about sequestering the jury when the first irregularity occurred on the 3rd day of trial, with the Respondents then participating as advocates in the conference in the judge's chambers, the burden and duty to inform the court was heavy upon them! (Appendix to Appeals Court Brief, pp. 130-137, Exh. "V"). By concealing and suppressing knowledge of the unauthorized contact with the

juror, the effect was the same as if the Respondents themselves had participated in the intrusion upon the jury - and its resulting verdict. Could the ensuing lack of judicial inquiry - considering the court's prior warnings - have been intended as a silent signal to the juror(s)? Or as a means for the Respondents to vouchsafe the"truthfulness" of the witness' in-court testimony? Cf. U.S. v. Modica, 663 F.2d 1173, 1178-79 (2nd Cir. 1981).

There was at that time (1965) and still is an unqualified affirmative duty and responsibility imposed, without exception, upon everyone by law and constitutional requisites to notify the court of such an encounter. That mandate applied to these Respondents with equal force and particularity as individuals, and as attorneys, officers of the Court. Mass. Gen. Laws, Chap. 221, § 38. That duty imposed existed from the moment they were told of

the encounter; continued to the end of the trial; and to all other opportunities they had to reveal what they knew (i.e., during all appellate stages, state and federal). The contrast of the fact scenario here to Imbler (and Smith v. Phillips) supra, is obvious by what the Court said in Rakes v. U.S., 169 F. 739, 745 (4th Cir. 1948) cert. den. 69 S.Ct. 51:

> "The inviolability of the jury room from outside influences of any sort, actual or potential, is a prime necessity in the administration of justice. That unqualified rule requires that if a person, whether on the jury or not, knows of such outside influence, or an attempt at it, he must at once report his information to the court." (Emphasis Added).

That person shall not hide it or conceal that such an event took place. There are no exceptions or equivocation; it applies to everyone, whether an individual, prosecutor, attorney, court officer, whatever.

The actions of the Respondents in

this instance were demonstrably inconsistent with required proceedural due process of the 14th Amendment and the substantive due process of the 5th Amendment, violative of federal and state law and the Constitution of the Commonwealth of Massachusetts, Pt. 1, Art. I and Art. XII. If the prosecutor, is not acting as such and not performing a function critical to the initiation and presentation of his case, he can and should be held accountable for his failure to disclose when under an affirmative duty so to do. Hilliard v. Williams, 465 F.2d 1212, 1217-18 (6th Cir. 1972); See: Guerro v. Mulhern, supra (absolute immunity not extended to investigatory role); Hirschkop v. Sneed, 594 F.2d 356, 364-67 (4th Cir. 1979) (prosecutor's duty to protect and preserve fair trial rights); Com. v. Tabor, 376 Mass. 811, 819, 384 NE2d 190 (1978).

CONCLUSION

For the reasons stated within, Petitioner William J. Leventhal respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully Submitted:

Dated:

29 June 1983

William J. Leventhal
pro se

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(617) 969 - 5480

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

82-1850

William J. Leventhal,
Plaintiff, Appellant,

v.

Murray P. Reiser, et al.,
Defendants, Appellees.

Before CAMPBELL,
BOWNES AND BREYER, CIRCUIT JUDGES

MEMORANDUM AND ORDER

Entered March 1, 1983

Appellant brought this action seeking some $36,000,000 in damages under 42 § U.S.C. 1983 and 1985, state tort law and federal anti-racketeering laws. The district court dismissed the action on several alternative grounds: failure to state a claim upon which relief could be granted; prosecutorial immunity; expiration of the statute of limitations; and collateral estoppel.

We need go no further than the prosecutorial immunity question. In Imbler v. Pachtman, 424 U.S. 409, 430 (1976) the Supreme Court found that prosecutors enjoy absolute immunity as to "activities...intimately associated with the judicial phase of the criminal process."

The conduct complained of in this case involved an apparently innocent ride offered by a prosecution witness to a stranded juror during appellant's trial. The witness informed the prosecutors of the event but they did not inform the court.

On its face the conduct comes squarely within the shield of Imbler. But appellant argues that the conduct was not protected because the chance encounter was not part of the trial.

However, appellant's cause of action is not based on the fact of the encounter but the failure to report it to the judge. If the prosecutors had a duty

to report it would only be because they were prosecutors and the encounter took place with a juror who was sitting in the trial. Thus the whole theory of liability is dependent on the defendants acting in their roles as prosecutors during the judicial phase of the criminal process.

As such the conduct is cloaked with absolute immunity and the district court's dismissal was correct. The judgment of the district court is affirmed.

By the Court:

/s/ Dana H. Gallup
clerk

cc: Messrs. Leventhal and Snider; Ms Katz.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

82-1850

WILLIAM J. LEVENTHAL,
Plaintiff, Appellant,

v.

MURRAY P. REISER, ET AL.,
Defendants, Appellees.

BEFORE CAMPBELL, Chief Judge,
COFFIN, BOWNES AND BREYER, Circuit Judges.

ORDER OF THE COURT

ENTERED APRIL 7, 1983

The petition for rehearing en banc is denied. Whether the prosecutor's conduct was improper or not is irrelevant. When, as here, the activity complained of concerns the prosecutor's conduct in the trial of the case absolute immunity applies.

By the Court:

/s/ Dana H. Gallup, Clerk

cc: Messrs: Leventhal & Snider; Ms. Katz.